United States Court of Appeals

for the Second Circuit

INTERVENOR'S BRIEF

76-4213

ORIGINAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4213

SOCIALIST WORKERS PARTY,
PETER CAMEJO and
WILLIE MAE REID,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

B
P/S

Petition for Review of an Order
of the
Federal Communications Commission

BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

JAMES A. McKENNA, JR.
CARL R. RAMEY

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 296-1600

September 27, 1976

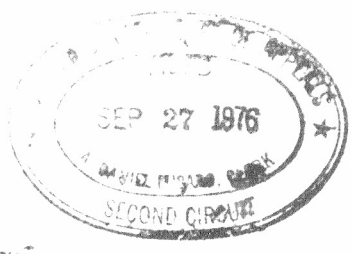

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT.)

TABLE OF AUTHORITIES

CONGRESSIONAL SOURCE MATERIAL:

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 76-4213

SOCIALIST WORKERS PARTY,
PETER CAMEJO and
WILLIE MAE REID,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,

Respondents.

Petition for Review of an Order
of the
Federal Communications Commission

BRIEF FOR INTERVENOR AMERICAN BROADCASTING COMPANIES, INC.

American Broadcasting Companies, Inc., ("ABC") operates national radio and television networks and was one of the broadcasters subject to the complaint filed by Petitioners with the Federal Communications Commission ("Commission"). ABC's Motion for Leave to Intervene in this

case was filed with the Court on September 24, 1976.

STATUTE INVOLVED

Section 315(a) of the Communications Act of 1934, as amended, 47 U.S.C. §315(a), provides:

> "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station; Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any--
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operat in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

COUNTERSTATEMENT OF THE CASE

Background to the Instant Case

In 1959, Congress amended Section 315(a) of the Communications Act of 1934 to exempt from the equal opportunities requirement four categories of news coverage: bona fide newscast, bona fide news interview, bona fide news documentary, and on-the-spot coverage of bona fide news events.*/ The broad purpose of the legislation was to permit broadcast journalism to provide more complete coverage of political candidates in news-type programs, without the strictures of equal opportunities obligations to all other candidates.**/ The legislative history makes clear that Congress did not undertake to define with precision the specific content of the "on-the-spot coverage of bona fide news events" exemption, but instead left that task to the Commission.***/

In two 1962 rulings involving non-studio debates between gubernatorial candidates, the Commission held that live broadcast coverage of such debates would not qualify for the

---

*/P.L. 86-274, §1,73 Stat. 557, amending 47 U.S.C. §315.

**/See, generally, S. Rep. No. 562, 86th Cong., 1st Sess. (1959); Hearings on Political Broadcasts--Equal Time Before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., comment of Chairman Harris at 2 (1959).

***/See S. Rep. No. 562, 86th Cong., 1st Sess. 12 (1959); Hearings on S. 1585, S. 1604, S. 1858 and S. 1929 Before the Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess. 96 (1959).

on-the-spot coverage of a bona fide news event exemption.*/ Similarly, in a 1964 ruling the Commission held that live broadcast coverage of an incumbent president's press conference would not qualify under this exemption.**/ For a period of years these three rulings were considered by the Commission, the broadcast industry, and presumably others to be the applicable law.

In 1975 in response to separate petitions from the Aspen Institute Program on Communications and Society (Aspen Institute) and CBS Inc. (CBS), the Commission re-examined its Wyckoff, Goodwill Station and 1964 CBS interpretations. After considering comments from the Democratic National Committee (DNC), the Honorable Shirley Chisholm, the National Organization for Women and others (including 1976 presidential candidates), the Commission (two Commissioners dissenting) issued a declaratory order announcing that it was reversing its interpretations and henceforth would consider good faith on-the-spot broadcast coverage of non-studio debates between candidates and of candidate press conferences as qualifying under the on-the-spot coverage of a bona fide news event exemption. Aspen Institute, 55 FCC 2d 697 (1975).

---

*/ National Broadcasting Co. (Wyckoff), 40 F.C.C. 370 (1962); The Goodwill Station, Inc., 40 F.C.C. 362 (1962).

**/ Columbia Broadcasting System, Inc., 40 F.C.C. 395 (1964).

Subsequently, DNC and Chisholm sought review in the United States Court of Appeals for the District of Columbia Circuit. The court (Judge Wright dissenting) affirmed the Commission, concluding that the Congress had assigned to the Commission the task of giving specific content to these exemptions and that the Commission had acted within its permissible discretion in reversing its earlier interpretation. The court also found no infirmity in the Commission's procedure. Rehearing was denied. Chisholm v. Federal Communications Commission, No. 75-1951 (D.C. Cir. April 12, 1976), petitions for certiorari pending, Nos. 76-101, 76-205.

The Instant Case

The proceeding in this case was initiated by a mailgram dated September 10, 1976, addressed to the Commission by the Socialist Workers Party. (See Pet. Brief, p. A-8). In that telegraphic message, Peter Camejo and Willie Mae Reid, Socialist Workers Party candidates for President and Vice President, respectively, and the Socialist Workers Party requested the Commission to order the ABC, NBC, and CBS television and radio networks to provide them with air time equal to that contemplated for the candidates of the Democratic and Republican parties in the "forthcoming debate[s]" sponsored by the League of Women Voters. The mailgram, dated 13 days preceding the first scheduled debate, requested urgent

"expedited consideration," stating that any "delay until the actual occurrence of the debate would be unwarranted and prejudicial to Petitioners."

Six days later, on September 16, 1976, counsel for the foregoing Petitioners forwarded a letter to the Commission designed to "incorporat[e] the petition previously sent by telegram." (Pet. Brief, pp. A-9 and A-10). In that follow-up letter, Petitioners acknowledged the Commission's new interpretation relative to certain non-studio debates under the "on-the-spot coverage of bona fide news events" exemption announced in Aspen Institute, but characterized that decision and apparently its affirmance in Chisholm as erroneous.

Without any additional explanation or demonstration of position, Petitioners merely volunteered that if the Commission wished to reconsider Aspen Institute, they were "prepared to present argument in support of Judge Wright's [dissenting] opinion" in Chisholm. If the Commission did not wish to reconsider Aspen Institute, Petitioners requested an immediate decision on their "petition" so that judicial review might be sought.

On September 20, 1976, the Chief of the Commission's Complaints and Compliance Division directed a letter to the Petitioners stating that no Commission action was warranted on their complaint. The letter also stated that the Commission had previously ruled in Aspen Institute that where a debate

between two candidates is arranged by a party not associated with any candidate or broadcaster and is broadcast live and in its entirety, the broadcast constitutes "on-the-spot coverage of a bona fide news event" within the meaning of the exemption contained in Section 315(a)(4) of the Communications Act, and would thus not be subject to equal opportunities.

Finally, the staff ruling indicated that the Socialist Workers Party had failed to provide any specific information to show that broadcasting of the debates sponsored and organized by the League of Women Voters would not satisfy the requirements established in Aspen Institute to be considered "on-the-spot coverage of a bona fide news event" exempt from equal opportunity obligations.

On the same day that the foregoing staff ruling was released, Petitioners made an oral application for review by the Commission. In a brief order released on September 22, 1976, the Commission denied review and thereby upheld the determination of its staff.

The Petition for Review and accompanying Motion for Expedited Consideration, Oral Argument and Decision were filed with this Court on September 22, 1976.

ARGUMENT

Introduction

Before the Commission, Petitioners did no more than baldly request equal opportunities with respect to the subject presidential debates and express disagreement with the Commission's Aspen Institute ruling. Totally devoid of amplification, their complaint contained no facts or information that would either call into question the validity of that prior ruling or challenge its application under present circumstances.

In this Court, after an opening characterization that "this is a case of statutory construction" (Pet. Brief, p. 10), Petitioners thereupon proceed to weave an intricate web of legislative bits and pieces. Simply stated, at this late hour and without ever having developed their contentions elsewhere, Petitioners ask this Court to examine from scratch, and within a matter of days declare invalid, the Commission's complicated interpretation of the legislative history and intent of the Section 315 exemptions. Not having participated in the proceedings that led to Aspen Institute, the appeal of that decision to the D.C. Circuit, or the pending petitions for certiorari of Chisholm, Petitioners here seek nothing more than to relitigate the precise issue decided in Chisholm.

In a further revelation of position, it is stated that "[i]n addition to the arguments presented below, we rely on the opinion of Circuit Judge Wright, dissenting in the Chisholm case, which analyzes the statute and its history and conclusively refutes the analysis of the Aspen Institute-Chisholm majority opinions." (Pet. Brief, p. 10). This is the essence and sole support for the claims in this Court. As we demonstrate, these contentions provide no valid basis for the requested review and reversal of agency action.

I.

REVIEW SHOULD BE DENIED BECAUSE THE ISSUES RAISED BY PETITIONERS ARE EITHER NOT PROPERLY BEFORE THIS COURT OR HAVE BEEN DECIDED BY ANOTHER COURT OF APPEALS

Intervenor ABC respectfully suggests, at the threshold, that Petitioners have not established any reasonable or practical basis to warrant review by this Court.

A. The Contentions Regarding Legislative History And Intent, Which Constitute The Sole Basis For The Requested Review And Reversal By This Court, Were Never Presented To The Commission By Petitioners.*/

While Petitioners' Brief suggests that "arguments [were] presented below," this is clearly refuted by the

---

*/It should be noted that Petitioners do, additionally, attempt a brief characterization of the format of the current debates (Pet. Brief, p. 35). However, this characterization is made within the context of their legislative history argument and, in any event, likewise was never presented to the Commission.

scanty record before the Commission which merely reflects that they requested "equal opportunities" and nothing more. Neither their initial mailgram request nor confirming letter contained any of the contentions presented here regarding their reading of the legislative history bearing upon the relevant Section 315 exemptions. Moreover, in seeking a declaration from this Court that broadcasting the subject debates would not be exempt under Section 315 (Pet. Brief, p. 2) and an order that they "be allowed to participate in all subsequent debates"(Pet. Brief, p. 54), Petitioners request specific relief that was not sought from the Commission.

A fundamental and consistently applied principle of administrative law is that the scope of appellate review must be confined solely to questions of fact and of law that have initially been offered for consideration and resolution to the appropriate regulatory agency. Unemployment Compensation Commission of the Territory of Alaska v. Aragon, 329 U.S. 143 (1946); U.S. v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952). As the Supreme Court observed in Aragon, supra:

> "The responsibility of applying the statutory provisions to the facts of [a] particular case [is] given in the first instance to the Commission. A reviewing Court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the Commission of an opportunity to consider the matter, make its ruling, and state the reasons for its action." 329 U.S. at 155.

This general concept of requiring that questions of law and fact be presented to the administrative agency before they may be properly considered in the context of judicial review has been embodied in several of the enacting statutes of the major federal regulatory agencies. Thus, with respect to the Federal Communications Commission, Section 405 of the Communications Act (47 U.S.C. §405), provides in pertinent part:

> . . . The filing of a petition for rehearing shall not be a condition precedent to judicial review . . . except where the party seeking such review . . . relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass." (47 U.S.C. §405; emphasis supplied).

In Hansen v. FCC, 413 F.2d 374 (D.C. Cir. 1969), where appellant sought to challenge the validity of a Commission forfeiture action for the first time in the Court of Appeals, the significance of §405 was described as follows:

> "Under 47 U.S.C. §405 (1962) this court is precluded from entertaining objections to issues which the Commission has not first been invited to rule upon through a petition for rehearing [citation omitted]. Section 405's prohibition of judicial review reflects the well settled doctrine expressed by Chief Judge Vinson in [Aragon, supra].*/

In sum, in situations such as this, the rule of law is plain and unequivocal. Relief and/or grounds not urged

---

*/See also Cornell University v. U.S., 427 F.2d 680, 684 (2d Cir. 1970).

before the Commission cannot be availed of upon review. As this Court noted in Gross v. FCC, 480 F.2d 1288, 1290-91, n.5(1973): "This bar [of Section 405] precluding judicial review of issues that the FCC has not had the initial opportunity to consider is not a mere technicality. It is grounded on sound policy reasons."

B. The Only Contentions Petitioners Assert Have Been Considered And Decided By The Court Of Appeals For The District Of Columbia Circuit.

While Petitioners may assume that it was not necessary to divulge their particular reading of legislative history before the Commission, owing to the existence of Aspen Institute and their offer to present arguments that would show the alleged erroneous nature of that decision and Chisholm, this will not suffice. It is simply not an acceptable procedure for a party seeking review under 47 U.S.C. §402(a) to file skeleton, unsupported requests before the agency and then let the grounds therefor blossom for the first time in the Court of Appeals.

At the same time, if the Petitioners' contention is that there is nothing new or different in their assertions, but merely that the Commission in Aspen Institute and the Court of Appeals in Chisholm were incorrect, we submit that there is simply no controversy that must be decided by this Court. In fact, the contentions developed for the first time in this Court by Petitioners are identical to those

considered and disposed of by the D.C. Circuit in Chisholm.

Although it is clear that decisions of other Circuits do not necessarily bind this Court--SEC v. Shapiro, 494 F.2d 1301, 1306 (2d Cir. 1974)--there is a general principle often adhered to in the federal judicial system that seems to have particular relevance in this case. Thus, as stated in Florida Citrus Exchange v. Folsom, 246 F.2d 850, 856 (5th Cir. 1957):

> "[W]here an identical issue is presented and no different principle is involved, the decision of another court of appeals is entitled to great weight and affords persuasive argument."*/

This principle was considered determinative in Personal Finance Co. v. Hadden, 142 F.2d 896 (6th Cir. 1944), cert. denied, 323 U.S. 752 (1944). There, in a bankruptcy proceeding where the failure of a District Court to permit review of a Referee's decision was at issue, the Circuit Court affirmed by relying on another Circuit Court decision involving a similar question. As the Hadden court emphasized:

> "There are no unusual circumstances here to distinguish appellant's case from the Ellithorpe case and we find no reason to disregard the general rule that in the interest of harmonious and efficient administration of the law we should accept the Ellithorpe case as correct."**/

---

*/Citing Sokol Brothers Furniture Co. v. Commissioner of Internal Revenue, 185 F.2d 222 (5th Cir. 1950), rehearing denied, 185 F.2d 677, cert. denied, 340 U.S. 952.

**/Hadden, supra, 142 F.2d at 897. See also Grimland v. U.S., 206 F.2d 589 (10th Cir. 1953).

We submit that Petitioners, having raised an issue and argument identical to that considered in Chisholm, and relying on no significant distinguishing circumstances, merely seeks review of precisely the same question by a second appellate court. This being the case, and recognizing both the public importance of the events developed in reliance on the Chisholm decision and the critical timing thereof, ABC urges the Court to recognize the foregoing principle by either declining to separately review this matter or issuing an order affirming the Commission, holding the Chisholm adjudication to be determinative of the present issues raised.*/

II.

IF THE COURT NEVERTHELESS FINDS THAT REVIEW IS WARRANTED, THE COMMISSION'S DECISION NOT TO ACT ON THE COMPLAINT IN THIS CASE SHOULD BE AFFIRMED

The Commission's decision dismissing or failing to take any action on Petitioner's complaint was reached for two reasons: (1) the Commission had previously ruled that non-studio debates could be broadcast under the on-the-spot news event exemption without invoking equal opportunities and

---

*/However, in the event neither of these courses are taken and the Court still determines that this case is ripe for review and consideration on the merits as asserted by Petitioners, ABC suggests that the case be transferred to the D.C. Circuit as proposed in the "Motion to Transfer" filed by the Commission on September 24, 1976, for the reasons stated in the Commission's contemporaneously filed "Memorandum In Support of Motion to Transfer."

(2) Petitioners had failed to make any showing whatsoever that the debates in question did not qualify under that exemption. In this Court, Petitioners seek to overturn the Commission's order rejecting their complaint by attacking the underlying basis for the Commission's earlier interpretative ruling. In short, they argue that the Commission was wrong here because it was wrong in earlier interpreting that non-studio debates could be encompassed within the (a)(4) exemption in Section 315 of the Communications Act. We submit that the Commission's 1975 interpretative ruling was appropriate and sound and that the dismissal of Petitioner's complaint based thereon was proper and necessary.

A. The Commission Acted Within Its Permissible Discretion In Changing Its Interpretation Of Section 315(a)(4) To Encompass Non-Studio Debates.

Petitioners, like the petitioners in Chisholm, argue that the "on-the-spot coverage of bona fide news events" exemption contained in Section 315(a)(4) of the Communications Act was intended to be construed narrowly, and that events subsequent to adoption of the 1959 Amendments to the Act foreclose the Commission's recent more expansive interpretation to include non-studio debates between candidates.

In effect, they argue for a narrow and restrictive construction of the Commission's authority to implement the purposes of the Communications Act--an approach fundamentally

at odds with consistent judicial interpretation, in a broad range of situations, of the nature of the Act and of the scope of the Commission's authority thereunder.

Congress did not determine which events would qualify for the (a)(4) exemption, but rather conterplated that the Commission would, by rules or case-by-case determinations, give specific content to the exemption. In earlier interpretations of the exemption, the Commission proceeded cautiously and did not include non-studio debates; consistent with its basic responsibility and considering intervening developments, it has now corrected what it considers to have been an unduly restrictive interpretation. There is more than ample basis for now concluding that non-studio debates qualify as bona fide news events. Neither the Commission's earlier cautious construction nor tacit Congressional, judicial and broadcast industry acceptance of that construction forecloses the Commission from reaching a more enlightened interpretation now. Moreover, the kind of more expansive interpretation which the Commission now gives to the (a)(4) exemption is in furtherance of the public's First Amendment right to be informed.

1. <u>The 1959 Amendments To Section 315 Empowered The Commission To Determine What Constitutes A Bona Fide News Event</u>.

Petitioners detail the history of Section 315, the original concept of which was that if a broadcaster permits a candidate for public office to use his facilities he must extend "equal opportunities' (sometimes referred to as "equal time") to all other candidates for such office. Prior to the 1959 Amendments, this requirement was interpreted to mean that virtually any appearance of candidate, in any kind of program context, triggered equal opportunities on the part of all competing candidates. Although the equal opportunities concept is supported by strong public policy considerations, its effect was to stultify broadcast journalism and hence the public's access to information about the major political candidates. The reason for this was that the broadcaster to cover, through news or other programming, the activities of major candidates was to invite equal time demands from minor or fringe candidates, often many in number. Of course, the practical effect was that all candidates were denied the coverage which broadcasters might have otherwise considered to be in the public interest.

The situation reached an intolerable extreme in the Commission's 1959 Lar Daly ruling*/ which extended the equal opportunities right to an incidental appearance in a

---

*/ Columbia Broadcasting System, 18 P & F Radio Reg. 238, reconsideration denied, 18 P & F Radio Reg. 701 (1959).

routine newscast. This development led the Congress to enact Public Law 86-274, sometimes referred to as the 1959 amendments and now embodied in 47 U.S.C. §315(a) (1970). This law exempted from the equal opportunities right appearances by candidates in the following formats: bona fide newscasts; bona fide news interviews; bona fide news documentaries (where the candidate's appearance is incidental to presentation of a subject); and on-the-spot coverage of bona fide news events.

In adopting exemptions to the equal opportunities right, Congress was mindful that it was taking a calculated risk that broadcasters might seek to favor one candidate over another and that the exemptions carried the potential for abuse. While protecting against such a development by calling attention to the broadcasters' obligation to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance and by specifying Commission oversight, there was a candid recognition that some risks were involved. The objective was perhaps best summarized in the concluding paragraph to Senate Report No. 562, July 22, 1959, which accompanied the Senate version of the 1959 Amendments:

> "The committee feels that the proposal contained in this legislation is in the public interest and worth the risk being taken when contrasted with the alternative which is a blackout in the presentation of legally qualified candidates in the news-type programs. Broadcasting journalism is a way of our life as is reporting through newspapers and magazines. The public has become dependent upon it and is entitled to it. This must be recognized. The full use of this dynamic media should not be shackled nor should it be abused. The committee feels that the proposal set forth herein is workable and fair. The public interest should benefit from it. If not, adequate opportunity to remedy it is available."*/

The terms which are used in the Section 315 exemptions, all relating to news-type programming, are not defined. Indeed, the Senate Report not only made clear that the exempt categories were difficult of precise definition, but charged the Commission with the responsibility to determine the particular programs falling within or without the exemptions.

> "It is difficult to define with precision what is a newscast, news interview, news documentary, or on-the-spot coverage of news event or panel discussion. That is why the committee in adopting the language of the proposed legislation carefully gave the Federal Communications Commission full flexibility and complete discretion to examine the facts in each complaint which may be filed with the Commission. In this way the Commission will be able to determine on the facts submitted in each case whether a newscast, news interview, news documentary, on-the-spot coverage of news event, or panel discussion is bona fide or a 'use' of the facilities requiring equal opportunity.

---

*/U.S. Code Congressional and Administrative News, 86th Cong., 1st Sess., 2564, 2576 (1959).

> The Congress created the Federal Communications Commission as an expert agency to administer the Communications Act of 1934. As experts in the field of radio and television, the Commission has gained a workable knowledge of the type of programs offered by the broadcasters in the field of news, and related fields. Based on this knowledge and other information that it is in a position to develop, the Commission can set down some definite guidelines through rules and regulations and wherever possible by interpretations." */

Thus, the Congress recognized that while it was giving general direction and guidance with respect to the news-type exemptions, there would remain for the Commission to adopt rules or render specific interpretations as to what the terms comprehended.

2. The Legislative History Does Not Support The Proposition That The Commission's Interpretation Regarding Non-Studio Debates Is Invalid Because Congress Considered and Rejected Efforts To Include A Specific Exemption For Debates.

Petitioners contend that the Commission should have found candidate debates ineligible under the general "on-the-spot coverage of bona fide news events" exemption because Congress considered but rejected several bills that would have provided a specific exemption for debates. This position cannot be sustained and is, in fact, an erroneous reading of the legislative deliberations.

---

*/ Id. at 2574.

In brief, a specific inclusion for newsworthy debates, as had been proposed in earlier separate bills, became unnecessary once it was determined to establish a broad exemption for on-the-spot coverage of bona fide news events. Thus, deletion of earlier debate provisions, rather than representing a substantive alteration in the final bill, reflected a shift in the degree of and necessity for specificity. This legislative scenario is amply depicted by the Chisholm court:

> "In drafting the exemptions, the Senate and House Committees drew from a number of proposed bills, including S. 1585, S. 1604, S. 1858, S. 1929, H.R. 7122, H.R. 7180, H.R. 7216, H.R. 7602, H.R. 7985, 86th Cong., 1st Sess. (1959). The final version did not include earlier proposals to enumerate specific exempt events, such as debates or panel discussions. See, e.g., the Hartke bill (S. 1858). The elimination of such specific formats, however, was not intended to exclude them if they could qualify under one of the general categories of news coverage in the final bill. Oren Harris, Chairman of the House Committee and the bill's floor manager, stated:
>
> > [T]he elimination of these categories by the committee was not intended to exclude any of these programs if they can be properly considered to be newscasts or on-the-spot coverage of news events.
>
> 105 Cong. Rec. 16229 (August 18, 1959). See also id. at 17782 (Sept. 2, 1959) (remarks of Rep. Harris).
>
> In short, in the final version of the bill, Congress opted for exemptions based on general categories relating to news coverage, rather than on specific program formats, and this of necessity left the Commission with the task of deciding which particular events could qualify within the limits of the statutory

language. Id. at 17778 (Sept. 2, 1959) (remarks of Rep. Harris). This is also clear from the language of §315(a)(4), '(including but not limited to political conventions and activities incidental thereto) . . . ' (emphasis added)."*/

3. The Kind Of Debates Encompassed By The Commission's Interpretative Ruling Are Not Inconsistent With Any Criteria Established By Congress.

Petitioners also attempt to show that Congress evidenced a deliberate intent that the non-studio debates encompassed by the Commission's Aspen Institute ruling would be ineligible for consideration as a bona fide news event. It is claimed, for example, by reference to floor debates and excerpts from committee reports, that Congress established definitive criteria, such as determining who has control of the format and the purpose of the event, to govern what constitutes a "bona fide news event." (Pet. Brief, pp. 31-34).

We believe that even on their face the cited excerpts fail to support the conclusion that any such definitive guidelines were established by Congress. In sum, what Petitioners essentially argue is that--like the argument of Judge Wright dissenting in Chisholm--the Commission should have accorded more weight to certain isolated parts of the voluminous legislative history that backdrops this area of the law.

---

*/ Chisholm, supra, Slip Opinion at 16-17, n. 17.

The pertinent cases before the Commission whose facts were considered in formulating the declaratory order issued in Aspen Institute were Wyckoff and Goodwill Station. Common to these cases was that a broadcaster, using good faith news judgment and without intent to favor one candidate over another, could make the determination that the events warranted on-the-spot news coverage. In both Wyckoff and Goodwill Station, debates were presented live before an audience, for the specific purpose of informing those in attendance.

On these facts, common sense and the elementary meaning of language dictate that bona fide news events are involved. Nor, contrary to Petitioners' attempted construction of established criteria, is there anything conclusive in the legislative history which would suggest that the Congress meant to exclude the situations here identified.

As we have shown, Congress, opting in favor of broader coverage of the political process and increased journalistic discretion, intended to let the Commission perform the function of determining whether any particular event qualified under the (a)(4) exemption. And while some members of Congress may not have intended that debates in the abstract be comprehended by the news exemptions, this aspect of the legislative history does not indicate that debates such as those in Wyckoff, Goodwill Station or the current situation were intended to be excluded from the exemption.

4. Neither Congressional Acquiscence In Past Commission Decisions Nor Any Other Actions Or Inactions By Congress Preclude The Commission's Current Ruling As To Non-Studio Debates.

Finally, Petitioners rely upon events in Congress subsequent to the 1959 amendments and the Commission's first interpretative decisions.

Attributing significance to Congressional failure to repudiate particular decisions is a "treacherous" venture at best. See Girouard v. U.S., 328 U.S. 61, 69 (1946); Zuber v. Allen, 396 U.S. 168 (1969). In Zuber, for example, the Supreme Court essentially answered the statutory construction theories advanced by Petitioners here in the following terms:

> "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. This Court has many times reconsidered statutory constructions that have been passively abided by Congress. Congressional inaction frequently betokens unawareness, preoccupation, or paralysis." 396 U.S. at 185, n.21.

Infusing certain Congressional acts or silence with special relevance is particularly hazardous here in light of the decision of Congress to delegate to the Commission discretion to decide which particular events qualify for the broadly defined news coverage exemptions. That Congress did not seek to reverse the Commission's earlier decisions reflects the broad

scope of the Commission's discretion, not affirmative Congressional approval of those decisions.*/

The regulatory scheme established under the Communications Act, it must be emphasized, gives broad authority to the Commission to react to the changing dynamics in communications. In this perspective, and given the obvious absence of any clear-cut contrary legislative direction, it cannot be fairly said that the Congress, either in 1959 or subsequently, reflected an "intent" that the Wyckoff and Goodwill Station interpretations were such an ingrained part of the Section 315 scheme as to be beyond reexamination.

III.

PETITIONERS HAVE NO STATUTORY RIGHT TO PARTICIPATE IN THE DEBATES

Included in the relief requested by Petitioners is an order that they "be allowed to participate equally in all subsequent debates." (Pet. Brief, p. 54). By the plain meaning of its language and consistent interpretation thereof by the Commission, Section 315 of the Communications Act

---

*/To further support their theory that Congressional inaction is persuasive evidence that Wyckoff and Goodwill Station were consistent with legislative intent, Petitioners suggest that the Lar Daly experience is indicative of the ability of Congress to act swiftly "if its intent had been violated." (Pet. Brief, p. 51). Lar Daly, if will be recalled, was finally decided by the Commission in June of 1959, leading to enactment of the Section 315 exemptions only three months later. Public Law 86-274, September 14, 1959. In contrast, it can be noted that Aspen Institute was decided nearly one year ago and Congress has obviously not seen fit to duplicate its rush to rectify Lar Daly.

affords political candidates only the right to later broadcast time if the rule of equal opportunities is violated. See, e.g., Socialist Workers 1970 New York State Campaign Committee, 26 FCC 2d 38 (1970). Accordingly, to the extent Petitioners seek an order from this Court or the Commission mandating their participation in the subject debates, they urge a course that must be rejected as directly contrary to the statutory design.

CONCLUSION

For the foregoing reasons, ABC urges the Court to either deny review or issue an order affirming the Commission's decision.

Respectfully submitted,

JAMES A. McKENNA, JR.
CARL R. RAMEY

McKENNA, WILKINSON & KITTNER
1150 Seventeenth Street, N.W.
Washington, D.C. 20036

Counsel for American Broadcasting Companies, Inc.

September 27, 1976

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SOCIALIST WORKERS PARTY, PETER CAMEJO, AND WILLIE MAE REID, Petitioners,	)	
v.	)	Case No. 76-4213
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

CERTIFICATE OF SERVICE

I, Carl R. Ramey, do hereby certify that I have, this 27th day of September, 1976, caused to be sent, via hand delivery, copies of the attached "Brief for Intervenor American Broadcasting Companies, Inc." to the following:

Eric M. Leiberman, Esq.
Rabinowitz, Boudin and Standard
30 East 42nd Street
New York, NY 10017

Counsel for Petitioners

Donald I. Baker, Esq.
Barry B. Grossman, Esq.
Appellate Division
Department of Justice
10th & Constit. Ave., N.W.
Washington, D.C. 20530

Counsel for Federal Communications Commission

Werner Hartenberger, Esq.
Stephen A. Sharp, Esq.
Office of General Counsel
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Howard Monderer, Esq.
National Broadcasting Co., Inc.
1800 K Street, N.W.
Washington, D.C. 20006

Counsel for NBC, Inc.

J. Roger Wollenberg, Esq.
Timothy B. Dyk, Esq.
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for CBS, Inc.

Arthur M. Becker, Esq.
Harry M. Plotkin, Esq.
Theodore D. Frank, Esq.
Arent, Fox, Kintner
Plotkin & Kahn
1815 H Street, N.W.
Washington, D.C. 20006

Counsel for Public
Broadcasting Service

Carl R. Ramey